EX PARTE OR LATE FILED

ORIGINAL

A Professional Limited Liability Company
307 North Michigan Avenue. Suite *1020*
Chicago. Illinois 60601
Telephone 312-372-3930
Facsimile 312-372-3939

February 5,2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

via federal express

RE: American Cable Association ("ACA"); Reply Comments in MB Docket No. 02-277; 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules

Dear Ms. Dortch:

On behalf of ACA. we respectfully request that the Commission accept ACAs Reply Comments in MB Docket No. 02-277 as timely filed and formally accepted. Under 47 CFR § 1.3 of the Commission's Rules, the Commission can admit a late-filed pleading if good cause is shown.

The deadline in this proceeding was Monday, February 3, 2002. We mailed ACAs pleading via US Post Office Express Mail on Saturday. February 1, with a guaranteed delivery date of February 3. Unfortunately, it was not delivered *to* the FCC until the morning of February 4, one day after the established deadline. We respectfully request that the Commission allow ACAs Reply Comments be accepted as timely filed and formally included in this proceeding. If necessary, we would be happy to provide you copies of the Express Mail receipts.

We enclose a copy of ACA's Reply Comments. We also enclose a "file" copy of this letter and ask that you date-stamp it and return it in the enclosed pre-addressed envelope.

Thank you for your attention to this matter. If you have any questions or if you need any additional information. please call me at 312-372-3930.

Sincerely,

Emily A. Denney

Enclosure

cc: Matthew M. Polka
Chris Cinnamon
George Callard

Filing request 020403 doc

Before the
Federal Communications Commission
Washington, D.C. **20554**

I the Matter c	)	
	)	
2002 Biennial Regulatory Review	)	
	)	
Review of the Commission's Broadcast	)	MB Docket No. 02-277
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	

American Cable Association

Reply Comments

I. INTRODUCTION

To accurately assess the consequences of unprecedented consolidation in the broadcast television sector, the Commission must examine how network owners and major affiliate groups exploit retransmission consent when dealing with small cable companies.

For smaller cable operators and smaller market consumers, retransmission consent has become a vise. On one side of the vise are a handful of media conglomerates – Disney, Fox, Hearst-Argyle, Gannett, and a few others – with ever increasing demands, On the other side are retransmission consent laws and outdated FCC market protection regulations. Squeezed in the middle are smaller cable operators and consumers.

AS a result, small cable companies and small market consumers must pay far more than their big city/big cable counterparts for access to local broadcast signals. The higher costs come in two forms First are retransmission consent tying arrangements. To get access to a local network signal, Disney, Fox, Hearst-Argyle and others force carriage of, and payment for, affiliated satellite programming. Second, in this most recent round, cash for carriage demands have proliferated. The network owners demand tying arrangements or sham cash "alternatives" of on average $0 70 per customer per month. Gannett and Cox Broadcasting are demanding strictly cash for carriage, take it or leave it.

The corporate *quest* for new revenue streams from smaller markets has washed away any pretense of localism, Smaller market consumers are the losers.

This problem draws a bright line between big and small. First, this is a distinctly small cable problem The big MSOs, with millions of customers and a range of other negotiation advantages, reportedly are receiving consent to carry local signals with little fanfare.[1] Not so for smaller cable operators. Second, this is big broadcaster problem. When dealing with independent broadcasters and small affiliate groups, ACA members report mutually beneficial carriage arrangements. In short, a few media conglomerates are exploiting hundreds of smaller cable companies and millions of rural consumers.

The consequences in smaller markets are self-evident: higher costs, fewer voices and choices, and utter disregard for localism. And it is getting worse.

In this retransmission consent round, in growing numbers, small cable operators

---

[1] *Most Cable MSOs Get Deals Done on Retransmission Consent,* Communications Daily

are concluding that neither their businesses nor their customers can support the retransmission consent demands of the media conglomerates. The broadcasters are withholding consent. Signals are being dropped in market after market.

These Reply Comments provide the Commission with substantial evidence of pervasive exploitation of retransmission consent in smaller markets and the harm to the public interest in localism. choice, and reasonable rates for basic cable. We also append ACA's Petition for Inquiry into Retransinission Consent Practices and the First Supplement to that Petition.' These filings contain numerous additional examples of retransmission consent abuse by network owners and should be included in this docket.

American Cable Association. ACA represents nearly 1,000 independent cable companies that serve about 7 5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets About half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges *of* building, operating, and upgrading broadband networks in lower density markets Many ACA members are facing retransmission consent tying and cash for carriage demands by the networks owners and major affiliate groups.

(January 10. 2003)

[2] *Petition for Inquiry into Retransmission Consent Practices,* American Cable Association (filed October 1, 2002) ("Petition for Inquiry"); *Petition for Inquiry into Retransmission Consent Practices, First Supplement,* American Cable Association (filed December 9, 2002) ["Supplement"). We attach ACA's Petition for Inquiry as Exhibit A, and ACA's Supplement as Exhibit B.

II. ANALYSIS

A. Exploitation of retransmission consent in smaller markets by a handful of media conglomerates has resulted in reduced choice, higher costs, and the loss of broadcast signals on rural cable systems.

Retransmission consent, 47 USC § 325 became the law of the land in 1992, at a time when broadcast ownership was far more dispersed than today. In implementing Section 325, the Commission emphasized the fundamental importance of localism and cooperation between broadcasters and cable "[T]he statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public."[3] Retransmission consent should provide "incentives for both parties to come to mutually-beneficial arrangements."[4] Since then, we have seen unprecedented consolidation of broadcast licenses and other media interests

Today, five companies – Disney, Hearst-Argyle, Fox, Gannet!, and Cox Broadcasting – control at least 104 broadcast stations in 60 television markets.[5] These markets encompass 65 million television households.[6] ACA estimates that its members

---

[3] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage issues, Memorandum Opinion and Order,* 9 FCC Rcd 6723 (1994) *("7994 Broadcast Signal Carriage Order")* at ¶ 104 (emphasis added).

[4] *Id* at ¶ 115 (emphasis added), *See also* ¶ 107 (interpretation *of* Section 325 guided by maintaining ability of broadcasters and cable operators Io negotiate mutually advantageous arrangements).

[5] See Exhibit C, summarizing data from www.hearstargyle.com/stations; www gannett com/map/television.html; www coxenterprises.com/corp/advertising/cxe.html; www.newscorp com/feg/fegreport2002/fox annual2002.pdf; and 2002 Cable and Television Factbook. Volume No. 70, **p.** A-1706

serve six million customers in these markets, inost often in the smaller communities on the fringes of the DMA. Solely because of media consolidation and exploitation of retransmission consent, these smaller cable operators and their six million customers face higher costs and reduced choice. Moreover, as a result of excessive cash for carriage demands by Gannett. Cox Broadcasting and others, tens of thousands of rural consumers are losing access to local network programming on cable.

The following sections discuss the two principle tactics used to exploit retransmission consent – tying arrangements and cash for carriage.

1. Retransmission consent tying – theexploitation of a local broadcast license to force carriage of, and payment for, affiliated satellite programming.

The attached Petition for Inquiry and First Supplement detail the pervasive problem of retransmission consent tying in the small cable sector. These filings describe how a handful of network owners and major affiliate groups use retransmission consent and "take it or leave it" tying arrangements to force small cable systems and iheir customers *to* pay for affiliated satellite pi-ogramming as a condition of carriage of a local signal

The Petition for Inquiry and Supplement contain numerous examples of tying arrangements foisted on ACA members, including:

- Tying retransmission consent for Hearst-Argyle stations to carriage of Lifetime and Lifetime Movie Network.
- Tying retransmission consent for ABC in one market to carriage of other

---

[6] See Exhibit C, summarizing data from 2002 Cable and Television Factbook, Volume No *70* **pp** A-I – A-3

unwanted Disney programming in other markets

- Tying retransmission consent for Fox and UPN to carriage of Fox Sports channels, Fox News, FX, National Geographic Channel. Fox Health Channel, and Fox Movie Channel.

During this round, ACA has received from members many more reports of increased tying demands by network owners and affiliate groups.[7] As described in the Petition for Inquiry, this conduct conflicts with the intent and purpose of Section 325 and increases costs while decreasing choice in smaller markets.

Before reaching any conclusions on the consequences of media consolidation, the Commission should investigate the pervasive abuse of retransmission consent by a handful of media conglomerates The Petition for Inquiry sets forth the legal basis for this action and provides ample evidence to support opening the inquiry

2. Cash for carriage – use of a local broadcast license to extract revenue from smaller market cable operators and consumers.

In the most recent round *of* retransmission consent, the small cable sector has faced a proliferation of cash for carriage demands.[8] For example, Gannett has deployed a national strategy of demanding that small cable companies pay between $0 15 and $1 00 per subscriber per month. Disney and Hearst-Argyle are demanding $0 70 per subscriber per month if a cable operator will not agree to their tying arrangement. Cox Broadcasting is demanding up io 50.30 per subscriber. In short. retransmission consent has become a scheme for media conglomerates to transfer

---

[7] See Exhibit D, containing representative examples of retransmission consent tying and cash for carriage demands.

[8] See Exhibit D.

wealth from rural consumers and small companies to corporate headquarters in New York. Los Angeles, and Atlanta

The potential cost to rural consumers is huge – more than $172 million per year, just for access to "free" over-the-air network programming.[9]

Small operators uniformly report that their systems and customers cannot support such deinands. Moreover, for the first time. several small cable operators are beinq forced *to* remove local broadcast siqnals because of unreasonable cash for carriaqe demands.

For example, in Macon, Georgia, the Gannett-owned CBS affiliate, WMAZ-TV, has demanded monthly fees of between $0.75 and $1.00 per subscriber per month in 2003. Three small cable operators, Piedmont Cable, Reynolds Cable, and Valley Cable, explained to Gannett that their customers would not stand for the rate increase required to fund these payments. The broadcaster remained intransigent, and the small cable systems were forced to delete the local CBS affiliate

Several other small cable operators and consumers have lost access *to* Cox Gannett and Hearst-Argyle stations for the same reason.

- Cash for carriage demands forced Country Cable TV and Tele-Media to remove NBC affiliate WJAC-TV in Johnstown, Pennsylvania. Cox Broadcasting owns WJAC.
- Cash for carriage demands forced Bellair TV Cable Company in the Steubenville-Wheeling market to remove NBC affiliate WTOV – another station owned by Cox Broadcasting.

[9] ACA members report cash for carriage demands *for* network signals that average about $0.60 per subscriber per month. If all four major networks charged this fee, ACA's six million smaller market customers would pay about $172 8 million per year. mostly to Disney, Fox, Gannett, Cox, and Hearst-Argyle.

- Cash for carriage demands forced Community Cablevision, a rural Oklahoma operator, to dropped KOCO .the Hearst-Argyle owned ABC affiliate in Oklahoma City.

As current extensions of retransmission consent agreements expire, ACA anticipates that more small cable operators will be forced to drop local broadcast stations.

The media conglomerates will aim to lull the Commission into believing these developments are examples of a "vibrant marketplace for retransmission consent". In evaluating this pitch, remember the Commission's words ten years ago:

Retransmission consent should serve "to preserve local broadcast service to the public"[10] and provide "incentives for both parties to come to mutually-beneficial arranqements."[11] In markets served by small cable, media consolidation and corporate avarice have turned this policy on its head. Now a few powerful players are using the retransmission consent process to withhold local network programming, unless consumers and small cable operators pay the price

B. FCC market protection regulations enable exploitation of retransmission consent; **those** regulations are obsolete and should **be** revised.

Media conglomerates form one side of the vise of retransmission consent. The other side consists of FCC market protection regulations. The regulations are known as Network Non-duplication[12] and Syndicated Exclusivity.[13] The Commission first

---

[10] *1994 Broadcast Signal Carriage Order* at ¶ 104 (emphasis added)

[11] *id* at ¶ 115 (emphasis added); *See also* ¶ 107.

[12] 47 CFR §§ *76* 92 – *76* 95.

promulgated these regulations more than 20 years ago, back when a local network broadcaster was truly local and needed protection.

In a nutshell, these regulations entitle a media conglomerate to withhold a local network signal from a cable operator *and* prevent that cable operator from bringing in a substitute network signal. Put another way, because of these regulations, no marketplace can exist for network signals on cable. This is precisely how Disney, Fox, Gannett and the others get the leverage to exploit retransmission consent Because these companies can block substitute network and syndicated programming in a market, they are the only game in town

Disney, Fox, Gannett and the others argue that the price they demand for their local network signals merely reflects the value of that programming. The Commission must see through this doublespeak. The reality is that the price they demand for their programming reflects market exclusivity enforceable through outdated regulations. To test this, the Commission should ask the following questions of Disney, Fox, Gannett Cox Broadcasting, and Hearst-Argyle:

> *Would you object if a smaller cable operator obtained lower cost network programming from other markefs? If you object, why?*

The answers to these questions will expose the fallacies of the "market value" arguments. The value does not come from "new, improved" network programming. The value comes from market power and regulatory and contractual exclusivity.

In the hands of the network owners and major affiliate groups, the market

---

[13] 47 CFR §§ 76.101 – 76.110.

protection regulations are no longer a shield to protect local stations. These regulations have become a sword used to bleed small cable operators and consumers

Along with examining broadcast ownership regulations. the Cornmission should initiate a rulemaking to revise the market protection regulations to stop this conduct It is past time for a change.

III. CONCLUSION

The network owners and major affiliate groups are using the retransmission consent process and the Commission's market protection regulations to squeeze small cable and consumers The holders of more than 100 broadcast television licensees have abandoned any pretense of localism. This conduct increases costs and reduces voices and choices.

To evaluate fully the consequences of broadcast media consolidation, the Cornmission must consider how the largest holders of broadcast licenses are exploiting retransmission consent in smaller markets. Easing current ownership restrictions will only allow the problem io spread In addition, the Commission should:

- Initiate the retransmission consent inquiry requested by ACA.
- Initiate a rulemaking to update the regulations governing Network Non-duplication and Syndicated Exclusivity.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: _____

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Emily A. Denney
George D. Callard
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable Association

February 1, 2003

ACA Reply 020103.doc

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Inquiry Into	)	MB Docket No. ____
Retransmission Consent Practices	)	
	)	
To: The Commission	)	

PETITION FOR INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Emily A. Denney
Nicole E. Paolini
Cinnamon Mueller
307 North Michigan Ave.
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable Association

October 1, 2002

Table of Contents

SUMMARY

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. In particular. the Commission should look at the retransmission consent tying arrangements that network owners and major affiliate groups force on smaller cable companies. Increasingly. a few media conglomerates – powerful players like Disney/ABC, Fox/News Corp., and GE/NBC – are pulling the strings behind local retransmission consent negotiations. They are tying carriage of a local network broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many of these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside the broadcaster's market.

In short, when dealing with smaller cable companies, these media conglomerates have turned retransmission consent into a one-way conversation driven by national corporate strategies to increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices. This conduct by a few media conglomerates also places independent programmers with competing programming at a distinct disadvantage.

In the *Digital Must Carry Order,* the Commission acknowledged ACA's concerns with retransmission consent tying, asked for more information, and committed to take appropriate action as necessary. In response, ACA provided the Commission with specific examples of retransmission consent tying arrangements. Examples included:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.

- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other markets.

- Tying of retransmission consent for Fox Network in one market to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel in other markets.

- Tying of retransmission consent fnr NBC in nne market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets

The upcoming round of retransmission consent is imminent. ACA members fear the worst. Media consolidation has accelerated. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and higher costs on small cable companies and consumers. ACA asks the Commission to follow through on its commitment to monitor retransmission consent practices and address the harm to small cable operators and the consumers they serve. Initiating a Section 403 inquiry is the most efficient and restrained next step.

The Commission has ample statutory authority to initiate an inquiry into retransmission consent. The statutory bases for an inquiry into retransmission consent practices include the following: (i) the Commission's authority under 47 USC § 403; (ii) the retransmission consent provisions in 47 USC § 325; and (iii) the change of control provisions governing broadcast licenses in 47 USC § 310(d). The inquiry will enable the Commission to evaluate how network owners and major affiliate groups are abusing the retransmission consent process contrary to Section 325 and Commission regulations and policies, and whether certain retransmission consent practices constitute unauthorized changes in control of broadcast licenses.

Retransmission consent tying practices conflict with the intent and purpose of Section 325. As stated by the Commission. "the statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public." The retransmission consent framework is aimed to secure local cable carriage of commercial broadcast signals through "mutually beneficial arrangements." Media consolidation has enabled a handful of companies to upend these goals. Retransmission consent tying arrangements have nothing to do with preserving local

broadcast service through "mutually beneficial arrangements," and everything to do with advancing the revenue goals of corporate parents and satellite programming affiliates on the backs of small cable operators and their customers. Similarly, the aim of achieving a more "even competitive level" in retransmission consent negotiations is now an anachronism, at least for small cable operators facing DisneyiABC. Fox/News Corp.. GEINBC, CBS/Viacom or Hearst-Argyle.

Section 325(b)(3)(A) also expressly directs the Commission to consider the impact of its retransmission consent regulations on basic rates. In 1993, the Commission found little evidence of rate impact. Nearly 10 years later, much has changed. The pressure on basic rates as a result of current retransmission consent tying practices should be self-evident.

These developments have occurred since the Commission implemented retransmission consent in 1993 and 1994. A Section 403 inquiry will help the Commission reevaluate the efficacy of current regulations in advancing the goals of Section 325, especially in light of unprecedented media consolidation.

Current retransmission consent practices constitute unauthorized transfers of control in violation of Section 310(d). Section 325 created retransmission consent rights for each commercial broadcast licensee, and no other entity. It is well-settled under Section 310(d) that a broadcast licensee cannot transfer or assign responsibility for these rights without first obtaining the Commission's consent. The examples of retransmission consent practices provided by ACA show how affiliated satellite programming entities are controlling retransmission consent rights of local stations. No Commission order has authorized these changes in control.

The good faith negotiation regulations provide no protection for **small cable operators.** The Commission has ample evidence that few, if any, small cable operators do not have the resources to file a complaint against DisneyiABC, Fox/News Corp.. GEINBC, or CBS/Viacom under the good faith negotiation regulations. The lack of resources to defend against retransmission consent abuses is precisely what makes small cable operators easy targets for the network owners and major affiliate groups.

An inquiry into retransmission consent practices is necessary and appropriate, and provides the most efficient means of Commission action. A Section 403 inquiry will provide the Commission with a developed record to determine the harm caused in smaller markets by retransmission consent tying and other practices of network owners and major affiliate groups. The inquiry will also provide independent satellite programmers an opportunity to present evidence of how tying arrangements impede their ability to distribute their programming. From that record, the Commission can determine what further action is most appropriate.

To assist the Commission in evaluating the conduct of network owners and major affiliate groups, ACA will supplement this Petition with information provided by its members concerning the retransmission consent practices they face in the upcoming months.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Inquiry Into	)	MB Docket No. ____
Retransmission Consent Practices	)	
	)	
To: The Commission	)	

PETITION FOR INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

I. INTRODUCTION

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. The inquiry should explore how retransmission consent tying arrangements employed by a few media conglomerates have fundamentally transformed the retransmission consent process in many markets served by smaller cable companies, Increasingly, powerful players like Disney/ABC, Fox/News Corp., and GE/NBC are pulling the strings behind local retransmission consent negotiations, and are tying consent to carry a local broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many *of* these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside of the broadcaster's market.

In short, when dealing with smaller cable companies, network owners and some major affiliate groups have turned retransmission consent into a one-way conversation driven by corporate strategies to increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices. These resulting harms squarely conflict with the intent and purpose of the retransmission consent laws and regulations. Independent satellite programmers may also be harmed by retransmission consent tying. Due to limited capacity on smaller cable systems, tying arrangements restrict the ability of those systems to carry additional services.

The upcoming round of retransmission consent provides a key opportunity for the Commission to evaluate retransmission consent practices and their impact on smaller cable companies and consumers, ACA requests that the Commission initiate an inquiry to that end. To assist the Commission's consideration *of* the issues raised here, ACA will supplement this Petition with reports from its members on retransmission consent practices they face in the coming months.

American Cable Association. ACA represents more than 930 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems that focus on small markets. About half *of* ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and

upgrading broadband networks in lower density markets. Many ACA members have been on the receiving end of retransmission consent tying and fear increasing retransmission abuses in the upcoming round

II. BACKGROUND – MEDIA CONSOLIDATION, THE RISE OF TYING ARRANGEMENTS, AND THE NEED TO EXAMINE CURRENT RETRANSMISSION CONSENT PRACTICES

Retransmission consent became law in 1992, with the intent to help local broadcasters secure carriage on cable systems through mutually beneficial arrangements. Since then, media ownership has consolidated at a remarkable pace. Programming and content companies have combined with television networks and broadcast licensees to create a few media powerhouses – Disney/ABC, CBS/Viacom, Fox/News Corp., and GE/NBC. Major affiliate groups like Hearst-Argyle also control many network stations

In many markets served by small cable operators, mutually beneficial arrangements negotiated with local network broadcasters have been supplanted by edicts from distant corporate offices, with consent to carry a local broadcast signal conditioned on a range of costly tying arrangements. Examples of retransmission consent tying faced by small cable operators include:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.
- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other markets.
- Tying of retransmission consent for Fox Network in one market to carriage of Fox Sports. Fox News, FX, National Geographic Channel, and Fox Health Channel in other markets.

- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets

- Conditioning the consent to transfer a retransmission consent agreement from one small cable operator to another to carriage of additional satellite programming not required in the original agreement.

Increasingly for smaller cable operators, retransmission consent for network signals means being on the receiving end of a one-way conversation. The result? Forced carriage of additional satellite programming and higher costs for small cable companies and their customers.

ACA has been raising this issue consistently with the Commission since 1995.[1] Last year, in the *Digital Must Carry* Order, the Commission expressly recognized small cable's "important concerns" over retransmission consent tying.[2] The Commission declined to act at that time, indicating that "substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result."[3] The Commission committed to "continue to monitor the situation with respect

---

[1] *In re Applications of Capital Cites/ABC, Inc. and the Walt Disney Company for Consent to the Transfer of Control of Broadcast and Television Station Licenses, Petition* to *Deny* of *the Small Cable Business Association ("SCBA") (filed September* 27. 1995); *In re Application for Transfer of Control of CBS Corporation and its Licensee Subsidiaries from Shareholders of CBS Corporation to Viacom, Inc., Petition* to *Deny of ACA (filed December* 31, 1999); *In the Matter of Carriage of Digital Television Broadcasf Signals. CS Docket* No. 98-120, *Comments* of *SCBA (filed October* 13. 1998), *and Comments of* **the** *American Cable Association (filed June* 8, 2001) ("ACA *Digital Must Carry Comments").*

[2] *In the Matter of Carriage of Digital Television Broadcast Signals, CS Docket* No. 98-120, *First Report* ***and*** *Order and Further Notice of Proposed Rulemaking, FCC* 01-22 (rel. *January* 23, 2001) *("Digital Must Carry Order") at* ¶ 35 *(referencing comments of* the *Small Cable Business Association. the former name* of *ACA).* ¶ 121, *and Final Regulatory Flexibility Analysis.* ¶ 20.

[3] *Digital Must Carry Order* at ¶ 35

to potential anticompetitive conduct by broadcasters in this context."[4] Upon a showing that tying arrangements harm small cable operators and their subscribers, the Commission would "consider appropriate courses of action".[5]

In response, ACA provided the substantial evidence sought by the Commission – specific, real-world examples of retransmission consent tying faced by smaller cable companies.[6] Each example involves tying retransmission consent for a local network signal to carriage of, and payment for, one or more satellite programs. Several of the cases describe tying carriage of satellite programming on cable systems *outside* the market of the local broadcast station. Most of these cases also involve obligations to carry, and pay for, satellite programming for years beyond the retransmission consent election period. These examples show how a few media conglomerates are exploiting local broadcast licenses to benefit their affiliated satellite programming, with no concern for the resulting harms of increased costs and decreased choice for smaller market cable systems and their customers.

The next round of retransmission consent is imminent. Small cable operators fear the worst. Media consolidation has accelerated. The disparities in company size, market power, and resources have become immense. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and

---

[4] *Id*

[5] *Id*

[6] ACA Digital Must Carry Comments at 4-16. We attach as Exhibit A pertinent excerpts from that filing. See *also In* the Matter of Petition for Inquiry into Network Practices (filed March 8, 2001) (filed by Network Affiliated Stations Alliance) **("NASA** Petition *for* Inquiry"), ACA Comments (filed July 20, 2001).